72-282

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 72-282

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, ALABAMA, et al.,
Petitioners,

vs.

DORIS ELAINE BROWN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

The school board of the City of Bessemer, Alabama, petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 11, 1972.

OPINIONS BELOW

Although this proceeding has been pending since 1965 resulting in a number of opinions of both the United States District Court for the Northern District of Alabama

and the United States Court of Appeals for the Fifth Circuit, the opinion of the courts below directly preceding this petition and upon which it is based, are:

1. The opinion of the United States Court of Appeals filed July 11, 1972 not yet reported. (Appendix 1)

2. The opinion of the United States District Court for the Northern District of Alabama ordered and filed August 30, 1971. (Appendix 2)

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1972. The mandate was ordered to issue forthwith (Appendix 1). Application for recall and stay of mandate was made on July 18, 1972. No decision has been rendered on this application. The jurisdiction of this court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Must a school system which has never transported students to schools and which is now a unitary school system be required to transport students to schools?

2. May an appellate court require transportation of students for the purpose of achieving a racial balance without affording the school board the opportunity of a hearing, and without postponing the effectiveness of the order requiring bussing pending appeal?

STATEMENT OF THE CASE

The petitioners are seeking a review of the decision of the United States Court of Appeals for the Fifth Circuit reversing and remanding with directions an order of

Judge Pointer, Judge of the United States District Court for the Northern District of Alabama. This decision held in part that the Board of Education of the City of Bessemer was required to provide transportation to a portion of its students.

The district court, after a hearing in chambers, made an order from the bench affirming the plan for desegregation of the Bessemer schools presented by the Board except for the two high schools. The district court amended the plan providing for these two schools by zoning non-contiguous zones. The school board, after the hearing and prior to entering of the written order, filed objections pointing out certain of the transportation difficulties which could be encountered. The court then amended its announced plan by the addition of a provision for transfer in the event of transportation difficulties. (Appendix 2, Para. 5(d).) The opinion, as thus amended, was filed on August 30, 1971.

The plaintiffs appealed resulting in the order of the Fifth Circuit sought to be reviewed. (Appendix 1)

At the beginning of the 1971 school term there were 7,035 students in the Bessemer school system. The boundaries of the school district were those of the city limits and encompassed about 12 square miles. Bessemer had never owned or operated any transportation system for any of its students. The segregation complained of was established by zoning and not by bussing. No hearing was ever had in the lower court on cost of bussing, the problems inherent thereto or of the financial ability of the Bessemer Board of Education to provide busses. The order of the appeals court directs the district court to require the school board to provide transportation.

Since the case was submitted but prior to the decision on July 11, 1972, Congress passed the "Educational

Amendments of 1972." The pertinent part of the Act has been attached as Appendix 3.

Subsequent to the order of the Court of Appeals, the district court held a hearing for the purpose of determining whether section 803 of the "Educational Amendments of 1972" would allow or require a stay of that portion of the order requiring the bussing in the September 1972 term. At the conclusion of the hearing, the court announced from the bench that the school board must present its plan for bussing by August 15, 1972 and that the court did not find that the act applied to this case since the bussing had been directed by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The granting of the Writ of Certiorari offers the court the opportunity, first, to redefine or clarify for lower Federal courts the rules for bussing promulgated in its case of **Swan v. Charlotte-Mecklenburg Board of Education,** 402 US 1, 91 Sup. Ct. 1267 (1971), and, second, to clearly enunciate the effect of the "Educational Amendments of 1972" insofar as the requirement for bussing of children during appeal.

The language in the **Swan** case, has not clarified doubts and misunderstandings which have heretofore existed in school systems, district and appeal courts, insofar as bussing may be required. In general, the district courts have read the decision that bussing is one of the remedies but have sought others. The courts of appeal read it to say it is **the** remedy. School boards who have never operated busses and thereby could not be said to have constructed or contributed to a segregated system with busses, have suggested other remedies for obvious reasons. **United States v. Greenwood Municipal Separate School District,** ... F. 2d ... (5th Circuit 1972) (Appendix 4). **Brewer v. School Board of City of Norfolk, Virginia,** 456 F. 2d 943 (4th Cir. 1972), cert. denied.

Swan presented a school district which had established its segregated system by the use of busses; a case in which a lower district judge, after examining all of the facts and circumstances, had determined that bussing was an acceptable solution, under the facts and circumstances there present. The Supreme Court upheld his judgment in that matter. The appeals courts have, in most cases, rejected any district judge who has held that bussing was not required and have, in general, required the large ex-

penditure of monies for transportation of pupils despite these findings of the district judges. In **Swan** at 91 Sup. Ct. P. 1282, the court said:

> "The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this court and by the very nature of the problem it cannot be defined with precision."

It then later said:

> "Thus, the remedial techniques used in the district court's order were within that court's power to provide equitable relief;"

It then followed approving the decree of the district court for the use of bussing in this school system. In that case, the court discussed at length the bussing system presently operated by Charlotte and then found:

> "In these circumstances we find no basis for holding that local school authorities may not be required to employ bus transportation as one tool of school desegregation."

The **Charlotte** decree was based on circumstances at hand.

Courts of appeal generally have read **Swan** to require bussing regardless of the findings of the district courts.

On June 26, 1972, the President signed into law an Act passed by Congress in an effort to curb bussing while some national solution to the problem is found. The magnitude of the problem can hardly be exaggerated. It is no longer a southern problem but has spread to all sections. The intent of Congress that it should be handled the same in the north, south, east and west is evident. At the writing of this petition the sub-committee of the House Education Committee is reported to have supported the bill recommended by the President to the Congress. This Bill provides additional safeguards against bussing.

In this case, the order of the Court of Appeals directs the district court to order bussing and to require such bussing to commence September 1972. The local district judge determined that the order of the Court of Appeals left him no discretion in this matter; that regardless of the law, he could not stay the bussing pending any appeal. The district judge in the instant case, did not see that it was necessary for him to reach the issue of constitutionality of Section 803 as he did not find this law was applicable to this situation.

Should this court, however, find that §803 is applicable in this case, its constitutionality would be an issue.

Article 3, Section 1 of the Constitution of the United States, provides:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of Article 3 provides:

> "In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make."

It seems without question, that the jurisdiction of the lower courts are clearly within Congressional power. This court has recognized this Congressional power. The case of **Lockerty v. Phillips**, 319 US 182, 87 Law Ed. 1339, 1343 (1942), would appear to be directly in point. In this opinion the court says:

> "All Federal courts, other than the Supreme Court, derived their jurisdiction wholly from their authority to 'ordain and establish' inferior courts, conferred

on Congress by Article 3, Section 1 of the Constitution. It could have declined to create any such courts, leaving the suitors to be remedies afforded by state courts, with such appellate review by this court as Congress might prescribe. **Kline v. Burke Construction Company**, 260 US 226, 234, 67 Law Ed. 226, 232, 43 S Ct 79, 24 ALR 1077, and cases cited. M'Intire v. Wood, 7 Cranch (US) 504, 506, 3 Law Ed. 420. The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."

Again, in **Glidden v. Zdanok**, 370 US 503, 8 Law Ed. (2) 671, 697 (1962):

"Congress has on occasion withdrawn jurisdiction from the court of claims to proceed with the disposition of cases pending therein and has been upheld in so doing by this court. **E.g. District of Columbia v. Eslin**, 183 US 62, 46 Law Ed. 85, 22 S Ct 17. But that it is not incompatible with the possession of Art. 3 judicial power by the tribunal affected. Congress has consistently with that article withdrawn the jurisdiction of this court to proceed with a case then sub judice, **Ex parte McCardle** (US), 7 Wall 506, 19 Law Ed. 264; its power can be no less when dealing with an inferior Federal court, **Re Hall**, 167 US 38, 42, 42 L Ed 69, 70, 17 S Ct. 723. For as Hamilton assured those of his contemporaries who were concerned about the reach of power that it might be vested in a federal judiciary, 'it ought to be recollected that the national legislature will have ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or

remove [any] . . . inconveniences'." The Federalist No. 80 (Wright Ed. (1961) at 505).

The **McCardle** case cited is also authority for the proposition that Congress does have the power to except or repeal appellate jurisdiction.

This is not unusual. The Norris-LaGuardia Act greatly restricted the power of lower federal courts to issue injunctions in labor disputes. The Voting Rights Act restricted to one particular district court the forum for cases involving this act. Senator Ervin of North Carolina in a speech made to the Senate on February 23, 1972 and found in the Congressional Record on pages S 2438-2443 (at Page 2439) lists 77 statutes in which Congress has withdrawn, restricted or ignored the original jurisdiction of the U.S. district courts, the appellate jurisdiction of the U.S. Courts of Appeal, and the original and appellate jurisdiction of the U.S. Supreme Court. It would seem as though the constitutionality of § 803 could not be an issue.

This then leads to the logical question: what is the effect of § 803? It only removes one of the equitable remedies proved by **Swan** for such a period of time that a school board can have the question of buying busses finally determined before it goes to the expenditure of sums of money, which, in its judgment are either unnecessary or undesirable.

While it is obviously true that in this particular case unless the writ of the Circuit Court of Appeals has been withdrawn and stayed subsequent to the writing of this petition, this school board may have been compelled, under the facts and circumstances at hand, and to expend such money. Nevertheless, it is a question that deserves an answer by this court for the benefit, if not of this particular school district, of the innumerable school districts over the United States that are at present confronted with this problem.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be granted to review the order entered July 11, 1972 by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted

J. HOWARD McENIRY, JR.
1721 Fourth Avenue
Bessemer, Alabama 35020
Attorney for Petitioners

Certificate of Service

I hereby certify that I have this the 8th day of August, 1972 served a copy of the foregoing Petition for Writ of Certiorari on the attorneys for respondents by depositing a copy in the United States mail in accordance with the rules of this court to their addresses as follows:

Solicitor General of the United States
Justice Department
Washington, D.C. 20530

Hon. Wayman Sherrer
United States Attorney
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All parties required to be served have been served.

J. Howard McEniry, Jr.
Attorney for Petitioners

APPENDIX 1

Opinion

(Filed July 11, 1972)

In the United States Court of Appeals
For the Fifth Circuit

No. 71-2892

Doris Elaine Brown, et al., Plaintiffs-Appellants,

versus

The Board of Education of the City of Bessemer, Alabama, et al., Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before Thornberry, Clark and Ingraham, Circuit Judges.

By the Court: We are again faced with the school desegregation problems of the City of Bessemer, Alabama. On July 16, 1971, we vacated and remanded an appeal in this case to the district court for reconsideration in light of the Supreme Court's decision in **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U. S. 1 (1971). On remand the district court ordered the defendant Board to prepare a plan showing geographical zoning proposals and projected enrollment by race for all schools involved. The Board's plan was filed and after an informal conference the plan, as it related to secondary schools, was modified

by the court in accordance with recommendations of the intervenor United States. The Board objected to the modification, mainly because it would be unable to transport students to the schools in their zones, and it thus filed a motion to amend the plan announced by the court from the bench.

The court amended its decree of August 30, 1971, and included the following provision:

> "(d) In the event by September 10, 1971, transportation is not reasonably available at moderate cost to a student assigned to a high school facility which exceeds by at least 1.5 miles the distance from his place of residence to the other high school facility operated by defendant Board of Education, that student shall be allowed upon request to the Board the right to attend the high school which is nearer to his residence. Distances to the two high schools from a student's place of residence shall be measured by road distance along paved roads which are in existence at the date of this order. In determining availability of transportation consideration shall be given to transportation as may hereafter be provided by action of the City Council of the City of Bessemer, by the City Board of Education of the City of Bessemer, by local civic or church groups, or other voluntary associations, or by groups of parents or persons interested in assisting in transportation, or by extension of routes of public bus services within the City of Bessemer. No requirement is made under this order directing that the City of Bessemer or the defendant Board of Education provide such transportation (this primarily due to the fact that neither governmental agency has in the past used busing to foster segregation of schools), but at the same time neither the City nor the City Board of Education

> shall in any wise restrict or discourage the providing of transportation through other sources and, for example, shall not refuse to give their consent to any application for extended bus routes from public bus facilities."

Plaintiffs appeal from the court's decree, asserting that the court erred by failing to require the Board to provide transportation for students who live considerable distances from the schools to which they are assigned in contravention of an otherwise efficacious desegregation plan. Plaintiffs also challenge the court's failure to require that transportation be provided for majority to minority transferees.

The School Board on the other hand urges that a school system which has never operated a transportation system, and that did not promote a dual system by use of buses, cannot be required to furnish transportation to meet the constitutional requirement of a unitary school system.

This court has recently spoken to the precise issue raised by this appeal. In **United States v. Greenwood Municipal Separate School District**, ... F.2d ... (5th Cir., 1972) [No. 71-2773, April 11, 1972], plaintiffs appealed from a district court refusal to order that transportation be provided to elementary students who were placed in noncontiguous school zones and required to attend school outside their neighborhoods. This court reversed, explaining:

> "In **Swann v. Charlotte-Mecklenburg Board of Education**, supra, the Supreme Court explicitly held that a school district which elects to utilize a majority-to-minority transfer plan as a desegregation tool **must** provide free transportation to each student making a transfer under the plan. 402 U.S. at 26, 27, 91 S.Ct. at 1281, 28 L.Ed. 2d at 572, 573. In

discussing the pairing and noncontiguous zoning techniques ordered by the trial court in **Swann**, the Supreme Court approved the trial court's direction to the educational authorities that bus transportation be used to implement these techniques:

> " 'In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.' 402 U.S. at 30, 91 S.Ct. at 1283, 28 L.Ed. 2d at 575.
>
> ". . . It is implicit in the decisions of the Supreme Court and of this court that it is the responsibility of school officials to take whatever remedial steps are necessary to disestablish the dual school system, including the provision of free bus transportation to students required to attend schools outside their neighborhoods. The black elementary students who were refused free transportation by the district court's order are victims of the remnants of the dual system of schools which existed for so long under the requirements of Mississippi constitutional and statutory provisions. No legitimate reason is put forth for forcing them and their parents to shoulder the burden of eliminating these vestiges of segregated schools in the circumstances present here." [Slip opinion at pp. 3-5.]

See **Brewer v. School Board of City of Norfolk, Virginia**, 456 F.2d 943, 946-47 (4th Cir., 1972), cert. den. ... U.S. ... (1972) [40 U.S.L.W. 3540].

The Board's argument that it lacks "the facilities, the buses, personnel or the know how to bus" is of no avail. The court below cannot compel a student to attend a distant school and then fail to provide him the means to

reach the school, nor can it allow circumvention of the desegregation plan by wholesale exceptions to transfer provisions. To do so would render the entire plan of desegregation a futile gesture. This court has continually recognized the requirements laid down in **Swann**, *supra*, and **Davis v. Board of School Commissioners of Mobile County**, 402 U.S. 33 (1971), that a district court utilize its broad equity power to fashion a remedy which will assure a unitary school system, and that, as in the instant case, this power encompasses transportation facilities. See, e.g., **United States v. Greenwood Municipal Separate School District**, *supra*; **Acree v. County Board of Education of Richmond**, ... F.2d ... (1972) [No. 72-1211, March 31, 1972]; **Dandridge v. Jefferson Parish School Board**, 456 F.2d 552 (5th Cir., 1972).

Accordingly, the judgment of the district court, insofar as it refused to require the Board of Education and city to provide free transportation to students zoned to attend school outside their neighborhoods, or under majority to minority transfer provisions, is Reversed and Remanded with directions to require defendants to provide such transportation. Since the school term has just ended, this order will apply to the 1972-73 school year. The mechanics of the method to be employed by the defendants in discharge of this duty are left to the district court.

The mandate shall issue forthwith.

Reversed and Remanded with directions.

APPENDIX 2

In the United States District Court
for the Northern District of Alabama
Southern Division

Doris Elaine Brown, et al.,
Plaintiffs,
United States of America,
Plaintiff-Intervenor,
v.
Board of Education of the City of Bessemer, et al.,
Defendants.

Civil Action
No. 65-366

Order

(Filed August 30, 1971)

In response to the Order of Remand from the United States Court of Appeals for the 5th Circuit and upon consideration of the evidence on file and the representations of the parties in chambers, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The plan filed by the Bessemer Board of Education on August 5, 1971, is approved for grades 1-8.

2. Students in grades 9-12 residing in the zones outlined for the elementary and middle schools taken from the August 5, 1971 plan shall be assigned to the high schools as follows:

Abrams	Lanier
Dunbar	Hard
	Davis
Abrams	Clarendon
	West Hills
Greenwood	Jonesboro
	Vance

3. The Bessemer Board of Education shall not offer academic courses at the City Vocational Center (Carver), nor shall vocational classes traditionally attended by whites (Distributive Education and Business Occupations) be offered at any school other than the City Vocational Center. The Board of Education may petition this Court to modify this provision. Such petition to be filed with the Court and served on the parties shall include the following:

(a) A list of the proposed vocational courses to be offered (including Distributive Education and Business Occupations) and the school where the offering is proposed. The Board of Education should include the academic courses proposed at the City Vocational School.

(b) A list by race of the students actually electing each course to be taken at City Vocational School (forms should be distributed to students for their election and copies attached to petition after being filled in by students).

(c) The number of students by race actually enrolled in each vocational course (including Distributive Education and Business Occupations) for each semester of 1970-71 showing the school at which each course was offered.

4. Students in Bessemer shall not be permitted to attend a school located outside the attendance zone of their

legal residence, except as provided in Paragraph 5 below. The legal residence of a student shall be determined by the residence of his parent(s) or by the legal residence of the student's custodial guardian if the student actually resides with his custodial guardian. If the student has neither living parents nor a custodial guardian, school assignment shall be determined by a student's actual residence. Guardianships of the estate shall not be used to determine school assignment.

5. (a) Any white student who is assigned to school in the Bessemer system or any other school in the Jefferson County system where there is 75% or higher white enrollment may, with the approval of the Bessemer Board (or both boards where between systems), transfer to any other school. Any black student who is assigned to a school in Jefferson County where there is more than 25% black enrollment may, with the approval of the Bessemer Board (or both boards where between systems), transfer to any other school where there is less than 25% black enrollment. Such transfers shall be made on a space available basis. The principal of the school receiving the student, shall not be allowed to refuse transfers as indicated in this paragraph to students of one race where a greater number of transfers have been allowed for students of the opposite race. The principal receiving such a student, shall require a certificate from the principal of the appropriate school from the zone of the student's legal residence showing the enrollment of white and black students at the school in the zone of the student's legal residence on the date the transfer was requested. Certificates shall be retained by the school system.

(b) Students who are scheduled to be twelfth grade pupils during the 1971 school year shall notwithstanding the alterations made in this plan, have the

option to attend during the 1971-72 school year the school which they attended the previous year. This provision shall (1) only be effective for the 1971-72 school year; (2) only apply if the student's attendance at the school during 1970-71 was at the proper school.

(c) A student attending a school in the Bessemer system whose race is in the majority shall be permitted to attend any other school in the system where his race is in the minority and be given priority to space.

(d) In the event by September 10, 1971, transportation is not reasonably available at moderate cost to a student assigned to a high school facility which exceeds by at least 1.5 miles the distance from his place of residence to the other high school facility operated by defendant Board of Education, that student shall be allowed upon request to the Board the right to attend the high school which is nearer to his residence. Distances to the two high schools from a student's place of residence shall be measured by road distance along paved roads which are in existence at the date of this order. In determining availability of transportation consideration shall be given to transportation as may hereafter be provided by action of the City Council of the City of Bessemer, by the City Board of Education of the City of Bessemer, by local civic or church groups, or other voluntary associations, or by groups of parents or persons interested in assisting in transportation, or by extension of routes of public bus services within the City of Bessemer. No requirement is made under this order directing that the City of Bessemer or the defendant Board of Education provide such transportation (this primarily due to the fact that neither governmental agency has in the past used busing to foster segregation of schools), but at the same time

neither the City nor the City Board of Education shall in any wise restrict or discourage the providing of transportation through other sources and, for example, shall not refuse to give their consent to any application for extended bus routes from public bus facilities.

6. By October 1 and February 1 of each school year, until the court directs otherwise, the Bessemer Board of Education shall file with this Court and serve on all parties a report containing the following information:

(a) The number of students by grade and race attending each school on September 20 and January 20. If school is not in session on these dates, the report shall be made on the succeeding school day;

(b) The number of students by race in each class at each school along with the race of the teacher assigned to each class;

(c) The number of full-time teachers by grade and race assigned to each school on the dates in paragraph A;

(d) The number of part-time teachers and teacher aides by grade and race assigned to each school on the dates in paragraph A;

(e) A report by race of the requests and the results which have accrued under the transfer provisions in this and other orders. The report shall give the student's name, grade, legal residence, race, parent(s) name and address, schools involved, reason request was made, whether the request was granted or denied and the basis for such disposition;

(f) A report of all students who have switched their residence or zones since the conclusion of the prior semester up to the attendance dates given in

Part A, indicating the name, grade, legal residence, race, former address, former school attendance zone, current address and current school attendance zone and parent(s) name and address for each such student. The report shall show the percentage of black students in the zone and system of his legal residence;

(g) A report showing the names of all students attending the Bessemer schools while residing in another school district indicating the student's name, legal residence, race and grade.

7. (a) All other previous orders of this court, except as modified herein, shall remain in full force and effect.

(b) All counsel are cautioned that any appeals from this order are to be processed in accordance with Part III of **Singleton v. Jackson Municipal Separate School District**, 419 F.2d 1211 (5th Cir., 1969), with the change, however, that three legible copies of all matters pertinent to the issues presented on the appeal are to be filed. No extension from the schedule established in **Singleton** will be allowed except by order of the panel of the 5th Circuit to which the appeal is assigned.

DONE and ORDERED this 30th day of August, 1971.

SAM C. POINTER, JR.
United States District Judge

APPENDIX 3

PUBLIC LAW 92-318
92nd CONGRESS, S. 659

JUNE 23, 1972

PROVISION RELATING TO COURT APPEALS

Sec. 802. Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974.

APPENDIX 4

In the
United States Court of Appeals
For the Fifth Circuit

No. 71-2773

United States of America,
Plaintiff,

versus

Greenwood Municipal Separate School District, et al.,
Defendants,

Lilly Russell, et al.,
Plaintiffs-Appellants,

versus

Greenwood Municipal Separate School District, et al.,
Defendants-Appellees.

Appeal From the United States District Court for the Northern District of Mississippi

---

(April 11, 1972)

Before Wisdom, Coleman and Simpson,
Circuit Judges.

Per Curiam: Once more we are called upon to deal with the desegregation problems of the Greenwood Municipal

Separate School District.[1] Pursuant to our remand of June 29, 1971, 445 F.2d 388, 389, for the entry of an order requiring the implementation of a plan complying with former decisions of this Court and with the principles established in *Swann v. Charlotte-Mecklenburg Board of Education*, 1971, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, the district court ordered the school district to provide free bus transportation to students who elect, on an individual basis, to change schools under the majority-to-minority transfer provision[2] of the District's court-ordered desegregation plan. With respect to elementary students who, in accordance with the desegregation plan, were placed in noncontiguous school zones and required to attend school outside their neighborhoods, the lower court declined to require the school district to provide free transportation. The plaintiffs have appealed from the district court's refusal to order free bus transportation for the latter class of students.[3]

On this appeal, the Negro plaintiffs contend that the failure of the district court to order free transportation

---

[1] In chronological order we have dealt with this District's problems in the following cases: *United States v. Greenwood Municipal Separate School District*, 5 Cir. 1969, 406 F.2d 1086, cert. denied 1969, 395 U.S. 907, 89 S.Ct. 1749, 23 L.Ed.2d 220; *United States v. Greenwood Municipal Separate School District*, 5 Cir. 1970, 422 F.2d 1250; *Russell v. Greenwood Municipal Separate School District*, 5 Cir., June 29, 1971, 445 F.2d 388; *United States v. Greenwood Municipal Separate School District*, 5 Cir., July 2, 1971, 444 F.2d 544, vacated as moot by *en banc* Court, ... F.2d ... (January 12, 1972). The desegregation suit was originally instituted by the United States in July, 1966.

[2] This provision entitles a student to transfer from a school in which his or her race is in the majority to a facility in which his or her race is in the minority.

[3] The United States as a party to this case did not initiate the motion involved in this appeal, but did participate in the lower court's proceedings and has failed an amicus curiae brief with this Court.

for those elementary students placed in noncontiguous zones will require black students transferred to the previously all-white Bankston School to walk two miles each way, across the main lines of the Illinois Central Railroad, through the central business district, across the Yazoo River, and along a main thoroughfare for one-half mile. The school district responds by arguing that the provision of free transportation is merely a matter of convenience for the black elementary students involved, that these black students have no constitutional claim to free transportation, that the school district has never furnished transportation to students who reside within the corporate limits of Greenwood, and that the school district is without funds to provide the requested transportation. The lower court, in addition to giving reasons for its decision essentially similar to those advanced by the school district on this appeal, observed that this court has previously required the provision of free transportation to students who elected to change schools under a majority-to-minority transfer plan but that we have never heretofore directed a school district to provide free transportation for children placed in noncontiguous zones who go to schools outside their neighborhoods.

In *Swann v. Charlotte-Mecklenburg Board of Education,* supra, the Supreme Court explicitly held that a school district which elects to utilize a majority-to-minority transfer plan as a desegregation tool *must* provide free transportation to each student making a transfer under the plan. 402 U.S. at 26, 27, 91 S.Ct. at 1281, 28 L.Ed.2d at 572, 573. In discussing the pairing and noncontiguous zoning techniques ordered by the trial court in *Swann,* the Supreme Court approved the trial court's direction to the educational authorities that bus transportation be used to implement these techniques:

> "In these circumstances, we find no basis for holding that the local school authorities may not be re-

quired to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school." 402 U.S. at 30, 91 S.Ct. at 1283, 28 L.Ed.2d at 575.

The plaintiffs and the United States are not in agreement as to the appropriate disposition of this case. The plaintiffs urge us to direct the district court to order the school district to provide free bus transportation to the elementary students placed in noncontiguous attendance zones. The United States asks us to remand the cause to the district court with instructions "to permit the parties to present evidence as to the transportation needs of students and the ability of the school district to meet those needs, and to make full findings of fact or opinion and findings."

We have again reviewed the extensive record in this proceeding and conclude that it is unnecessary to remand the cause to the district court for the hearing and findings suggested by the United States. It is implicit in the decisions of the Supreme Court and of this court that it is the responsibility of school officials to take whatever remedial steps are necessary to disestablish the dual school system, including the provision of free bus transportation to students required to attend schools outside their neighborhoods. The black elementary students who were refused free transportation by the district court's order are victims of the remnants of the dual system of schools which existed for so long under the requirements of Mississippi constitutional and statutory provisions. No legitimate reason is put forth for forcing them and their parents to shoulder the burden of eliminating these vestiges of segregated schools in the circumstances present here.

The judgment of the district court, insofar as it refused free transportation to elementary students zoned non-

contiguously to attend school outside their neighborhoods, is reversed and the cause is remanded with directions that the district court without delay require the school district to provide such transportation to the affected elementary students.

Let our mandate issue at once.

REVERSED and REMANDED with directions.

COLEMAN, Circuit Judge, dissents.

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In the

Supreme Court of the United States

October Term, 1972

No. 72-282

The Board of Education of
The City of Bessemer, Alabama, *et al.*,

Petitioners,

v.

Doris Elaine Brown, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

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Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported and appears at pages A-1 through A-5 of the Petition; the opinion of the United States District Court for the Northern District of Alabama is also unreported and appears at pages A-6 through A-11 of the petition.

The opinion of the Court of Appeals in *United States* v. *Greenwood Municipal Separate School District*, reprinted at pages A-13 through A-17 of the Petition, is now reported at 460 F.2d 1205.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a school district must furnish transportation to students who are reassigned beyond walking distance as part of a desegregation plan to remedy constitutional violations, rather than being allowed to bring about the failure of the desegregation plan by refusing such transportation and permitting students unable to furnish their own transportation to attend segregated schools.

2. Whether Section 803 of the Education Amendments of 1972, P.L. 92-318, applies to district court orders designed to remedy unlawful segregation and not to achieve racial balance.

Statement

Subsequent to the entry of judgment by the Court of Appeals, the district court held a hearing on August 21, 1972 and entered an order deleting from its prior decree the provision permitting students unable to obtain transportation to their assigned high school to transfer to the other high school. The application for recall and stay of the mandate of the United States Court of Appeals for the Fifth Circuit filed July 18, 1972 was denied by the Court of Appeals on August 17, 1972; no such stay application was ever addressed to a Justice of this Court by petitioners.

Reasons Why the Writ Should be Denied

Pursuant to the order of the district court of August 30, 1971 (which did not require the school district to furnish transportation but allowed pupils unable to reach the high school to which they were assigned under the Court-approved desegregation plan without free transportation to remain at the other high school), 111 black students and 26 white students in the Bessemer school system returned to the schools they had previously attended. Accordingly, during the 1971-72 school year, the high schools remained substantially segregated.

These facts make it clear that the furnishing of pupil transportation by the school system is an essential prerequisite to an effective plan of desegregation as required by *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971). The judgment below is clearly correct and, of course, the identical result was reached by the United States Court of Appeals for the Fourth Circuit in *Brewer* v. *School Board of City of Norfolk*, 456 F.2d 943, *cert. denied*, 406 U.S. 905 (1972). *Accord, United States* v. *Greenwood Municipal Separate School Dist., supra.* There is absolutely no ground whatsoever warranting review of the decision below.*

As to Section 803, we respectfully refer the Court to the construction of the statute by Mr. Justice Powell in *Drummond* v. *Acree*, No. A-250 (September 1, 1972). That correct interpretation of the statute, which is reflected in the actions of other Justices during the Court's summer recess

* Petitioners' attempt to distinguish this case from *Swann* must fail; the Charlotte school system was required by the district court's desegregation order to enlarge its transportation system by adding far more new vehicles and personnel than will be required in Bessemer.

denying stays in desegregation cases, is dispositive of the issue here. Furthermore, since no application to a Justice of this Court for such a stay was made following the denial of a stay by the Court of Appeals, and the plan has now been effectuated *with* free transportation, the issue will be mooted before this Court could render a decision on the merits even were it to grant the writ.

CONCLUSION

For the foregoing reasons, respondents respectfully pray that the Petition be denied.

Respectfully submitted,

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